Dato' Dr Mohamad Rameez bin Yahaya v Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 1) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-275–05 OF 2019
BADARIAH SAHAMID, SURAYA OTHMAN AND LAU BEE LAN JJCA
11 AUGUST 2020

Administrative Law — Judicial review — Application for — Review of decision of Disciplinary Board and Disciplinary Appeal Board, Public Service Commission — Trial judge dismissed application — Appeal against decision — Whether respondents' decision-making process tainted with illegalities, irrationalities and/or procedural improprieties — Whether there was procedural impropriety in second respondent's failure to provide clarity on status of punishment imposed by first respondent in earlier proceedings — Whether there was uncertainty in the effective date of punishment on the second charge as a result of two separate decision dates of the first respondent — Whether applicant was subjected to two punishments for same charge — Whether procedural improprieties tainted fairness and justice of proceedings — Whether decisions of respondents should be quashed

Civil Procedure — Appeal — Interference by appellate court — Whether there are serious procedural improprieties in decision-making process — Whether trial judge erred in his decision that there is no duty on second respondent to give specific directions when it remitted the second charge to the first respondent for re-consideration — Whether second respondent's failure to set aside the punishment on the second charge in the earlier proceedings before remitting the case to first respondent for its reconsideration was a serious procedural impropriety — Whether procedural improprieties are mere irregularities that can be rectified by suitable financial adjustment

During the period 26 June 2011 to 11 September 2015, Dato' Dr Mohamad Rameez bin Yahaya (the applicant) served at the office of the Consulate General of Malaysia in Melbourne, Australia. By a letter dated 29 September 2015, the applicant was issued a show cause letter which contained two charges of misconduct. The first charge related to the appointment of the applicant's nephew as a driver at the Consulate General Malaysia in Melbourne Australia, in contravention of article 1.1 of Pekeliling Perkhidmatan Pentadbiran Bilangan 4 Tahun 1981. The second charge related to the applicant's action in the appointment of Southbank Office Fitout and Furniture (Southbank) to carry fit-out works and renovation works at the Consulate General of Malaysia's office in Melbourne, Australia, when the Committee had appointed IRM Interiors PTY LTD (IRM) to carry out the said works. The charge said

that the applicant's action in appointing Southbank was in contravention of para 170.3(a) of the Treasury Instruction, which stipulates that a decision on such tenders must be made by a Committee appointed in writing with a composition of at least three persons. In response the applicant filed a representation in writing explaining his conduct in relation to both charges. In respect of the second charge, it was the applicant's stand that Southbank and IRM are the same company as can be seen from the invoice sent to the applicant's office and as disclosed in the costs, specifications and quotations of both companies. The Disciplinary Board for the Managerial Group (the first respondent) informed the applicant that it had found the applicant guilty on both charges and imposed on the applicant, the punishment of reduction of three salary scales for a period of 36 months in respect of both charges. The applicant filed an appeal against the said decision to the Disciplinary Appeal Board, Public Service Commission (the second respondent). After having considered the appeal the second respondent decided to set aside the first charge and to remit the matter back to the first respondent to reconsider the second charge. After reconsidering the second charge the first respondent found the applicant guilty of this charge and imposed the punishment of a salary reduction of three salary scales for a period of 36 months. When the appellant appealed to the second respondent against this decision, the latter affirmed the decision of the first respondent. The applicant applied under O 53 of the Rules of Court for a judicial review of the decision of the respondents and sought an order of certiorari to quash the decision. He applied on the grounds that the respondents' decision-making process was tainted with illegalities, irrationalities and/or procedural improprieties. The applicant also argued that the failure of the respondents to state the effective date of punishment on the second charge was fatal and that the respondents had failed to take into account that both Southbank and IRM were de facto the same company. In response, the respondents submitted that there was no legal duty on them to give reasons for the decisions made. At the hearing of the application the respondents raised a preliminary issue that the decision by the first respondent was not a final decision which is amenable to judicial review. Based on the evidence, the trial judge concluded that the second respondent's decision to remit the second charge to the first respondent and subsequently affirming the first respondent's decision in respect of the second charge is not tainted with any illegality, irrationality or procedural impropriety. The trial judge dismissed the applicant's judicial review application and hence the present appeal. The applicant contended that the trial judge had erred in his decision that there is no duty on the second respondent to give reasons or specific directions to the first respondent when it remitted the second charge to the first respondent for re-consideration; and when the second respondent failed to set aside the punishment on the second charge in the earlier proceedings before remitting the case to the first respondent for its reconsideration.

Held allowing the appeal with costs of RM20,000:

(1) It is settled law that administrative action in Malaysia is subject to control by judicial review on the grounds of illegality, irrationality and procedural impropriety, and that judicial review permits a review of both process and merit. In the present case, the second respondent had remitted the second charge back to the first respondent for re-consideration due to a discrepancy in punishment on the two charges between what was stated in the first respondent's record of proceedings and what was conveyed by the first respondent in a letter to the applicant. However, there was no mention in the said letter that consequential to the second charge being remitted to the first respondent for re-consideration, the punishment imposed on the second charge in the earlier proceedings before the first respondent would be set aside. The failure of the second respondent to set aside the punishment of reduction of three salary scales for 36 months on the second charge that was meted out by the first respondent in the earlier proceedings was clearly a procedural impropriety that had resulted in grave prejudice to the applicant. Since the second respondent had failed to set aside the punishment when it remitted the second charge to the first respondent for re-consideration, the said punishment remained in force. The applicant tendered documentary evidence to show that the punishment of reduction in salary by three salary scales was implemented consequential to the decision of the first respondent in earlier proceedings, and had not been set aside when the second respondent remitted the second charge to be re-considered by the first respondent. This meant that the punishment meted out in the earlier proceedings still subsisted while the second charge was being 'reconsidered', by the first respondent. Thus, the impartiality and integrity of the first respondent's subsequent proceedings for reconsideration is clearly compromised as it raises the spectre of bias by the decision maker, as there is a real likelihood that he may be predisposed to affirm a sentence that had not been set aside (see paras 22–30).

(2) In addition, the implementation of the punishment consequential to the first respondent's decision in the earlier proceedings has resulted in financial consequences to the applicant's livelihood as the applicant asserts that there has been no reimbursement of outstanding salary, bonus allowances and other benefits that should be due to him as a result. No evidence to the contrary has been tendered by the respondents. This omission by the second respondent to set aside the punishment by the first respondent when the second charge was remitted back to the first respondent for reconsideration is a serious procedural impropriety that has tainted the proceedings of the first respondent and cannot lawfully be maintained by the second respondent in its decision to affirm the decision of the first respondent (see paras 31–32).

(3) The second procedural impropriety is the failure of the first respondent to state the effective date of punishment of reduction of three salary scales for 36 months. Certainty in the effective date of implementation and duration of punishment meted out is a legitimate procedural expectation of the applicant and a necessary trait of a fair decision-making process. It cannot be the case where a punishment is pronounced without an effective date. It stands to reason that there cannot be two different dates of the commencement of the same punishment on the same charge against the same person, the applicant in the instant case. In addition, the consequences are also highly prejudicial for the applicant as the punishment pertains to three scales of reduction in salary for 36 months. In the present case there is uncertainty in the effective date of punishment on the second charge as a result of two separate decision dates of the first respondent. The consequence to the applicant is that the implementation of the punishment of the applicant's salary deduction by three salary scales from the date of the first respondent's first decision was therefore unlawful. This could not be dismissed as a mere irregularity which could be easily rectified by making necessary salary adjustments to comply with the Regulation as in effect and in practical terms the applicant was subjected to two punishments for the same charge (see paras 35–38, 41 & 43).

(4) In the circumstances, there are serious procedural improprieties in the decision-making process of the respondents that warrant appellate intervention. It would be a gross injustice to treat these serious procedural improprieties as mere irregularities that can be rectified by suitable financial adjustment, or to attempt to absolve the respondents of their public duty to act fairly by the argument that the implementation of the punishment is the function of the Public Service Department and the related Ministry, and thus not within the purview of the respondents. In exercising public functions against the individual, public bodies have a duty to act fairly in substance as well as procedure and courts have to be vigilant to ensure that might does not become right. These serious procedural improprieties have tainted the fairness and justice of the proceedings and it followed that the decisions of the respondents should be quashed (see paras 48–52).

[Bahasa Malaysia summary

Sepanjang tempoh 26 Jun 2011 hingga 11 September 2015, Dato' Dr Mohamad Rameez bin Yahaya ('pemohon') telah berkhidmat di pejabat Konsulat Jeneral Malaysia di Melbourne, Australia. Melalui surat bertarikh 29 September 2015, pemohon telah mengeluarkan surat tunjuk sebab yang mengandungi dua tuduhan salah laku. Pertuduhan pertama berkaitan dengan pelantikan anak saudara pemohon sebagai pemandu di Konsulat Jeneral Malaysia di Melbourne Australia, yang bertentangan dengan artikel 1.1

A Pekeliling Perkhidmatan Pentadbiran Bilangan 4 tahun 1981. Tuduhan kedua berkaitan dengan tindakan pemohon dalam pelantikan Southbank Office Fitout and Furniture ('Southbank') untuk menjalankan kerja-kerja Fit-Out dan kerja-kerja pengubahsuaian di pejabat Konsulat Jeneral Malaysia di Melbourne, Australia, ketika Jawatankuasa telah melantik IRM Interiors PTY
B LTD ('IRM') untuk melaksanakan kerja-kerja tersebut. Pertuduhan tersebut mengatakan bahawa tindakan pemohon dalam melantik Southbank bertentangan dengan perenggan 170.3(a) Arahan Perbendaharaan, yang menetapkan bahawa keputusan mengenai tender tersebut mesti dibuat oleh Jawatankuasa yang dilantik secara bertulis dengan komposisi
C sekurang-kurangnya tiga orang. Sebagai maklum balas, pemohon mengemukakan representasi secara bertulis yang menjelaskan kelakuannya berkaitan dengan kedua-dua pertuduhan tersebut. Mengenai pertuduhan kedua, adalah pendirian pemohon bahawa Southbank dan IRM adalah syarikat yang sama seperti yang dapat dilihat daripada invois yang dihantar ke
D pejabat pemohon dan seperti yang dinyatakan dalam kos, spesifikasi dan sebut harga kedua-dua syarikat. Lembaga Tatatertib untuk Kumpulan Pengurus ('responden pertama') memberitahu kepada pemohon bahawa pihaknya telah mendapati pemohon bersalah atas kedua-dua pertuduhan tersebut dan menjatuhkan ke atas pemohon, hukuman pengurangan tiga skala gaji untuk
E jangka masa 36 bulan berkenaan kedua-dua pertuduhan tersebut. Pemohon memfailkan rayuan terhadap keputusan tersebut kepada Lembaga Rayuan Tatatertib, Suruhanjaya Perkhidmatan Awam ('responden kedua'). Setelah mempertimbangkan rayuan tersebut, responden kedua memutuskan untuk mengetepikan pertuduhan pertama dan mengembalikan perkara itu kepada
F responden pertama untuk mempertimbangkan semula pertuduhan kedua. Setelah menimbangkan semula pertuduhan kedua, responden pertama mendapati pemohon bersalah atas pertuduhan ini dan menjatuhkan hukuman pengurangan gaji sebanyak tiga skala gaji untuk tempoh 36 bulan. Apabila perayu mengemukakan rayuan kepada responden kedua terhadap keputusan
G ini, responden kedua telah mengesahkan keputusan responden pertama. Pemohon memohon di bawah A 53 Kaedah-Kaedah Mahkamah untuk semakan kehakiman terhadap keputusan responden-responden dan memohon perintah certiorari untuk membatalkan keputusan tersebut. Dia memohon atas alasan bahawa proses membuat keputusan responden-responden dicemari
H dengan penyalahgunaan undang-undang, tidak rasional dan/atau penyelewengan prosedur. Pemohon juga berhujah bahawa kegagalan responden-responden untuk menyatakan tarikh hukuman yang efektif ke atas pertuduhan kedua adalah memudaratkan dan bahawa responden-responden telah gagal mengambil kira bahawa kedua-dua Southbank dan IRM adalah
I syarikat de facto yang sama. Dalam maklum balas, responden-responden berhujah bahawa tiada kewajiban sah ke atas mereka untuk memberi sebab-sebab keputusan tersebut dibuat. Semasa perbicaraan permohonan tersebut, responden-responden mengemukakan isu awal bahawa keputusan oleh responden pertama bukanlah keputusan muktamad yang membenarkan

semakan kehakiman. Berdasarkan keterangan tersebut, hakim perbicaraan menyimpulkan bahawa keputusan responden kedua untuk meremitkan pertuduhan kedua kepada responden pertama dan kemudian mengesahkan keputusan responden pertama berkenaan dengan pertuduhan kedua tidak dicemari dengan apa-apa yang tidak sah, tidak rasional atau prosedur yang tidak wajar. Hakim perbicaraan telah menolak permohonan semakan kehakiman pemohon dan justeru rayuan ini. Pemohon menegaskan bahawa hakim perbicaraan terkhilaf dalam keputusannya bahawa tiada kewajipan ke atas responden kedua untuk memberi sebab atau arahan spesifik kepada responden pertama apabila ia meremitkan pertuduhan kedua kepada responden pertama untuk pertimbangan semula; dan apabila responden kedua gagal untuk mengetepian hukuman pertuduhan kedua dalam prosding terdahulu sebelum meremitkan kes itu kepada responden pertama untuk pertimbangan semulannya.

Diputuskan, membenarkan rayuan dengan kos RM20,000:

(1) Ia adalah undang-undang tetap bahawa tindakan pentadbiran di Malaysia adalah tertakluk kepada kawalan oleh semakan kehakiman atas alasan tidak sah, tidak rasional dan prosedur yang tidak wajar, dan semakan kehakiman itu membenarkan semakan kedua-dua proses dan prestasi. Dalam kes ini, responden kedua telah meremitkan pertuduhan kedua kepada responden pertama untuk pertimbangan semula kerana perbezaan hukuman terhadap kedua-dua pertuduhan antara apa yang dinyatakan dalam rekod prosiding responden pertama dan apa yang disampaikan oleh responden pertama dalam surat kepada pemohon. Namun, dalam surat tersebut tidak disebutkan bahawa pertuduhan kedua diremitkan kepada responden pertama untuk dipertimbangkan semula, hukuman yang dikenakan atas pertuduhan kedua dalam prosiding terdahulu di hadapan responden pertama akan diketepikan. Kegagalan responden kedua untuk mengetepikan hukuman pengurangan tiga skala gaji selama 36 bulan atas pertuduhan kedua yang dijatuhkan oleh responden pertama dalam prosiding sebelumnya jelas merupakan ketidaktepatan prosedur yang telah mengakibatkan prasangka buruk terhadap pemohon. Oleh kerana responden kedua gagal mengetepikan hukuman ketika menjatuhkan pertuduhan kedua kepada responden pertama untuk pertimbangan semula, hukuman tersebut masih berkuat kuasa. Pemohon mengemukakan keterangan dokumentar untuk menunjukkan bahawa hukuman pengurangan gaji sebanyak tiga skala gaji dilaksanakan berdasarkan keputusan responden pertama dalam prosiding sebelumnya, dan tidak diketepikan ketika responden kedua meremitkan pertuduhan kedua untuk dipertimbangkan semula oleh responden pertama. Ini bermaksud hukuman yang dijatuhkan dalam prosiding sebelumnya masih ada sementara pertuduhan kedua sedang ‘dipertimbangkan semula’, oleh

responden pertama. Oleh itu, ketidakberpihakan dan integriti prosiding responden pertama untuk pertimbangan semula jelas dikompromikan kerana menimbulkan rasa berat sebelah oleh pembuat keputusan, kerana ada kemungkinan besar bahawa dia mungkin cenderung untuk mengesahkan hukuman yang belum diketepikan (lihat perenggan 22–30).

(2) Di samping itu, pelaksanaan hukuman yang berpunca daripada keputusan responden pertama dalam prosiding sebelumnya telah menyebabkan kesan kewangan kepada mata pencarian pemohon kerana pemohon menegaskan bahawa belum ada penggantian gaji tertunggak, elaun bonus dan faedah lain yang patut dibayar padanya akibat daripada itu. Tiada keterangan sebaliknya yang dikemukakan oleh responden. Peninggalan oleh responden kedua untuk mengetepikan hukuman oleh responden pertama ketika pertuduhan kedua diremitkan kembali kepada responden pertama untuk pertimbangan semula adalah ketidaktepatan prosedur yang serius yang telah mencemarkan prosiding responden pertama dan tidak dapat dipertahankan secara sah oleh yang kedua responden dalam keputusannya untuk mengesahkan keputusan responden pertama (lihat perenggan 31–32).

(3) Ketidaktepatan prosedur kedua adalah kegagalan responden pertama untuk menyatakan tarikh kuat kuasa hukuman untuk pengurangan tiga skala gaji selama 36 bulan. Kepastian tentang tarikh kuat kuasa dan jangka masa hukuman dijatuhkan adalah jangkaan prosedur yang sah daripada pemohon dan sifat yang diperlukan untuk proses membuat keputusan yang adil. Ia tidak boleh berlaku jika suatu hukuman dijatuhkan tanpa tarikh kuat kuasa. Adalah wajar bahawa tidak ada dua tarikh yang berlainan untuk memulakan hukuman yang sama dengan pertuduhan yang sama terhadap orang yang sama, iaitu pemohon dalam kes ini. Di samping itu, akibatnya juga sangat memudaratkan pemohon kerana hukumannya berkaitan dengan tiga skala pengurangan gaji selama 36 bulan. Dalam kes ini, terdapat ketidakpastian tarikh kuat kuasa hukuman atas pertuduhan kedua sebagai akibat daripada dua tarikh keputusan berasingan responden pertama. Akibat kepada pemohon adalah bahawa pelaksanaan hukuman pemotongan gaji pemohon dengan tiga skala gaji dari tarikh keputusan pertama responden pertama dengan itu adalah tidak sah. Ini tidak dapat ditolak sebagai ketidakteraturan semata-mata yang boleh dengan mudah diperbaiki dengan membuat pelarasan gaji yang perlu untuk mematuhi Peraturan kerana dari kesan dan dari segi praktikal pemohon adalah tertakluk kepada dua hukuman bagi pertuduhan yang sama (lihat perenggan 35–38, 41 & 43).

(4) Dalam keadaan tersebut, terdapat ketidaktepatan prosedur yang serius dalam proses membuat keputusan responden yang memerlukan campur

tangan pihak rayuan. Adalah suatu ketidakadilan yang ketara untuk menganggap ketidaktepatan prosedur yang serius ini sebagai luar aturan semata-mata yang dapat diperbaiki melalui penyelarasan kewangan yang sesuai, atau untuk berusaha membebaskan responden dari kewajipan awam mereka untuk bertindak adil dengan hujah bahawa pelaksanaan hukuman adalah fungsi Jabatan Perkhidmatan Awam dan Kementerian yang berkaitan, dan oleh itu bukan dalam bidang tugas responden-responden. Dalam menjalankan fungsi awam terhadap individu, badan awam memiliki kewajiban untuk bertindak secara adil dan prosedur serta pengadilan harus berwaspada untuk memastikan hal itu tidak menjadi benar. Ketidaktepatan prosedur yang serius ini telah mencemarkan keadilan dan keadilan prosiding dan justeru keputusan responden-responden hendaklah dibatalkan (lihat perenggan 48–52).]

Cases referred to

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA)) [2018] 2 MLJ 738; [2018] 6 CLJ 285, CA (refd)

Owi Cheng Ian v Suruhanjaya Pasukan Polis Diraja Malaysia & Ors [2014] 6 MLJ 695; [2014] 8 CLJ 559, CA (folld)

Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443; [2019] 4 CLJ 561, FC (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Legislation referred to

Federal Constitution arts 5(1), 7(1)

Public Officers (Conduct And Discipline) Regulations 1993 regs 4(2)(b), 37A, 41(1), (1)(c), (2)

Rules of Court 2012 O 53

Appeal from: Judicial Review Application No WA-25–196–08 of 2018 (High Court, Kuala Lumpur)

Ismail bin Badiuzzaman (Shahidan bin Baharom and Farah bt Helmy with him) (Ismail Badiuzzaman & Assoc) for the appellant.

Kogilambigai a/p Muthusamy (Liew Horng Bin with her) (Attorney General's Chambers) for the respondent.

Badariah Sahamid JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant/applicant against the decision of the High Court at Kuala Lumpur, delivered on 15 May 2019 which dismissed the applicant's judicial review application under O 53 of the Rules of Court 2012 ('the ROC 2012') seeking, inter alia, the following reliefs:

(a) an order of certiorari to quash the decision of the Disciplinary Board for the Managerial Group (No 1) ('Disciplinary Board') dated 6 April 2017, which found the applicant guilty of a disciplinary misconduct and imposed the punishment of a salary reduction of three salary scales for a period of 36 months; and/or

(b) an order of certiorari to quash the decision of the Disciplinary Appeal Board, Public Service Commission ('Disciplinary Appeal Board') dated 19 March 2018 which affirmed the decision of the Disciplinary Board on 6 April 2017.

BACKGROUND FACTS

[2] The narration of the salient facts is derived from the learned judge's 'judgment', with suitable modifications.

[3] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[4] The applicant is an Administrative and Diplomatic officer ('Pegawai Tadbir dan Diplomatik') and the Director of Jabatan Perancangan Dasar dan Penyelarasan, Ministry of Foreign Affairs, Wisma Putra, Putrajaya.

[5] Prior to his current position, the applicant was serving at the office of the Consulate General of Malaysia in Melbourne, Australia from 26 June 2011 to 11 September 2015. He was then posted to Chile as Malaysia's Ambassador until 2018 when he was transferred back to Malaysia to hold the current position.

[6] By a letter dated 29 September 2015, the applicant was issued a show cause letter which contained two charges of misconduct as follows:

PERTUDUHAN PERTAMA

Bahawa YBhg Dato' Dr Mohamad Rameez Yahaya, No Kad Pengenalan 690804-08-6489, Pegawai Tadbir dan Diplomatik Gred M54, Duta Besar Malaysia ke Chile, Kementerian Luar Negeri semasa bertugas sebagai Pegawai Tadbir dan Diplomatik Gred M54, Konsul Jeneral, Konsulat Jeneral Malaysia di Melbourne,

Australia, Kementerian Luar Negeri, mulai 26 Jun 2011 hingga 11 September 2015 telah melantik sepupu YBhg Dato' iaitu Mohamad Azian Bin Abdul Rasheed, No Passport A 24905656 sebagai pemandu bagi Konsulat Jeneral Malaysia di Melbourne, Australia bagi tempoh satu (1) tahun bermula dari 14 November 2011 sehingga 13 November 2012 melalui kontrak yang dibuat pada 1 November 2011.

Perbuatan YBhg Dato' tersebut bertentangan dengan perkara 1.1 Pekeliling Perkhidmatan Pentadbiran Bilangan 4 Tahun 1981, Kementerian Luar Negeri yang menyatakan:

> Sekiranya sesuatu kekosongan tidak dapat diisikan oleh warganegara tempatan atau asing yang bermastautin dengan sah di sesuatu tempat, warganegara Malaysia bolehlah dilantik dengan syarat mendapat kelulusan bertulis terlebih dahulu daripada Kementerian. Semasa mengemukakan cadangan ini pihak perwakilan adalah dipinta menyertakan satu surat akuan ditandatangani oleh Ketua Canseri yang mengesahkan:
>
> (i) Warganegara tersebut bukan saudara mara mana-mana pegawai atau perwakilan.

Perbuatan YBhg Dato' juga boleh ditafsirkan sebagai menyebabkan kepentingan peribadi bercanggah dengan tugas awam iaitu melanggar peraturan 4.2 (b) P.U. (A) 395/1993 yang menyatakan seperti berikut :

> 4. (2)Seseorang pegawai tidak boleh:
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> (b) berkelakuan dengan sedemikian cara yang mungkin menyebabkan kepentingan peribadinya bercanggah dengan tugas awamnya.

PERTUDUHAN KEDUA

Bahawa YBhg Dato' Dr Mohamad Rameez Yahaya, No Kad Pengenalan 690804-08-6489, Pegawai Tadbir dan Diplomatik Gred M54, Duta Besar Malaysia ke Chile, Kementerian Luar Negeri semasa bertugas sebagai Pegawai Tadbir dan Diplomatik Gred M54, Konsul Jeneral, Konsulat Jeneral Malaysia di Melbourne, Australia Kementerian Luar Negeri, mulai 26 Jun 2011 hingga 11 September 2015 telah melantik syarikat Southbank Office Fitout and Furniture untuk menjalankan kerja-kerja Fit-Out dan ubahsuai pejabat Konsulat General Malaysia di Melbourne, Australia melalui surat bertarikh 28 Oktober 2011 sedangkan Mesyuarat Jawatankuasa Perumahan Perwakilan (JKPP) MALAWAKIL Melbourne, pada mesyuarat bertarikh 10 Oktober 2011 yang dipengerusikan oleh YBhg Dato' sendiri, telah memilih Syarikat IRM Interiors PTY LTD untuk menjalankan kerja-kerja tersebut dan syarikat Southbank Office Fitout and Furniture bukan salah satu daripada syarikat yang tersenarai untuk pertimbangan mesyuarat.

Perbuatan YBhg Dato' tersebut melanggar Arahan Perbendaharaan 170.3 (a) yang menyatakan:

> 170.3 Perlantikan Dan Keputusan Jawatankuasa Sebut Harga
>
> (a) Keputusan mengenai sebut harga hendaklah dibuat oleh satu Jawatankuasa yang dilantik secara bertulis oleh Pegawai Pegawai dengan keahlian sekurang-kurangnya tiga (3) orang ...

A Perbuatan Y.Bhg. Dato' juga boleh ditafsirkan sebagai kurang cekap atau kurang berusaha serta tidak bertanggungjawab iaitu melanggar peraturan 4.2 (e) dengan (g) P.U. (A) 395/1993 seperti berikut:

4 (2) Seseorang pegawai tidak boleh:

B (e) kurang cekap dan kurang berusaha; dan

(g) tidak bertanggungjawab.

Jika YBhg Dato' didapati bersalah atas pertuduhan di atas, YBhg Dato' boleh dikenakan mana-mana satu atau apa-apa gabungan dua atau lebih hukuman yang dinyatakan dalam peraturan 38 P.U. (A) 395/1993 selain daripada
C hukuman buang kerja atau turun pangkat.

[7] In essence the first charge relates to the appointment of a nephew of the applicant as a driver at the Consulate General Malaysia in Melbourne Australia,
D for a period of one year commencing 14 November 2011 until 13 November 2012, by a contract dated 1 November 2011, wherein such appointment of a relative was in contravention of article 1.1 of Pekeliling Perkhidmatan Pentadbiran Bilangan 4 Tahun 1981, which action can be interpreted as causing a conflict between personal interest and public duties, which is in
E contravention of reg 4(2)(b) of PU(A) 395/1993.

[8] The second charge (the charge relevant to the instant appeal) relates to the applicant's action in the appointment of Southbank Office Fitout and Furniture ('Southbank') to carry fit-out works and renovation works at the
F Consulate General of Malaysia's office in Melbourne, Australia by a letter dated 28 October 2011, even though Southbank was not shortlisted for the Committee's consideration and the Committee, 'Jawatankuasa Perumahan Perwakilan' (JKPP) MALAWAKIL, Melbourne, which was chaired by the applicant had, on 10 October 2011 appointed IRM Interiors PTY LTD. to
G carry out the said works. The applicant's action was in contravention of para 170.3 (a) of Treasury Instruction which stipulate that a decision on such tenders must be made by a Committee appointed in writing with a composition of at least three persons.

H **[9]** In response to the two charges against him, the applicant, by a letter dated 19 October 2015 filed a representation to the first respondent in defence of his conduct. In respect of the second charge, the applicant's representation may be summarised as follows:

I (a) Southbank Office Fitout and Furniture and IRM Interiors PTY LTD are the same company;

(b) the name of both companies abovementioned appear in the same letterhead as can be seen from the invoice sent to the applicant's office; and

(c) the costs, specifications and quotations between both companies abovementioned were the same.

[10] By a letter dated 10 May 2016, the first respondent informed the applicant that the first respondent in its meeting on 12 April 2016, had found the applicant guilty on both charges and imposed on the applicant, the punishment of reduction of three salary scales for a period of 36 months in respect of both charges.

[11] The applicant thereafter, on 2 June 2016, filed an appeal against the said decision to the second respondent.

[12] By a letter dated 20 December 2016, the second respondent informed the applicant that having considered the applicant's appeal at a meeting on 5 December 2016, the second respondent had decided as follows:

(a) in respect of the first charge, to set aside the finding of guilt and punishment by the first respondent; and

(b) in respect of the second charge, to remit the matter back to the first respondent for re-consideration.

[13] The first respondent proceeded to reconsider the second charge against the applicant and informed the applicant of its decision by letter dated 17 May 2017, that pursuant to its decision dated 6 April 2017, the first respondent found the applicant guilty of the second charge and imposed the following punishment: 'Turun Gaji sebanyak tiga (3) pergerakan untuk tempoh 36 bulan' (salary reduction of three salary scales for a period of 36 months).

[14] By a letter dated 12 June 2017, the applicant forwarded an appeal against the first respondent's decision in respect of the second charge to the second respondent.

[15] On 19 March 2018, the second respondent affirmed the decision of the first respondent and informed the applicant by a letter dated 22 May 2018.

THE APPLICANT'S JUDICIAL REVIEW APPLICATION

The applicant's submissions

[16] The applicant's primary grounds in his application for judicial review may be summarised as follows:

(a) the respondents' decision-making process were tainted with illegalities, irrationalities and/or procedural improprieties as the second respondent

had failed to state its reasons or to give proper directions in remitting the second charge back to the first respondent for reconsideration;

(b) the respondents' decision is illegal, irrational and tainted with procedural impropriety as the first respondent has failed to constitute a different quorum to re-consider the second charge to avoid biasness or infringement of principles of natural justice;

(c) the reason given by the second respondent in remitting the second charge to be re-considered by the first respondent is unreasonable, doubtful and not supported by documentary evidence;

(d) the second respondent had failed to inform the applicant the reasons why the second charge was remitted back to the first respondent for re-consideration. This infringed the *audi alteram partem* principle;

(e) the failure of the first and second respondents to state the effective date of punishment on the second charge is fatal;

(f) the respondents have failed to give effect to the true meaning and intent of 'Arahan Perbendaharaan 170' in making its decisions;

(g) the respondents have failed to take into account that both Southbank Office Fitout and Furniture and IRM Interiors PTY LTD are de facto the same company; and

(h) the first respondent had failed to form an Investigation Committee to reconsider the second charge, in particular to ascertain whether the two companies abovementioned are the same entity.

The respondents' submissions

[17] The respondent's submissions may be summarised as follows:

(a) the issue on the composition of the first respondent when the second charge was remitted to the first respondent for re-consideration was not pleaded and therefore, should not be considered by the court;

(b) there is no requirement in law for the first respondent to specify the effective date of punishment ie the reduction of three salary scales for a period of 36 months as reg 41(2) of the Public Officers (Conduct and Discipline) Regulation 1993 provides that if no date of punishment is specified, the effective date would be the date the punishment is imposed;

(c) there is no requirement in law for the first respondent to request a new representation from the applicant in order to reconsider the second charge which was remitted back to the first respondent for re-consideration;

(d) there is no legal duty on the first respondent and the second respondent to give reasons for the decisions made;

(e) there is no requirement in law for the first respondent to inform the applicant of his right of appeal to the second respondent; and

(f) the non-establishment of an investigation committee is not irrational in the circumstances of the instant case.

FINDINGS AND DECISION OF THE HIGH COURT

[18] The learned judge had dismissed the applicant's judicial review application. The grounds for dismissal are as follows:

(a) the respondents had raised a preliminary issue that the decision by the first respondent on 6 April 2017 is not a final decision which is amenable to judicial review. The learned judge agreed with the respondents and stated as follows (in paras 20–22 of his 'judgment'):

> Reverting to the present case, it is not disputed that the respondents' decision on 10.5.2016 was appeal against to the second respondent. Thereafter, the second respondent has decided on 5.12.2016 to set aside the finding of guilt for the first charge and remitted back the second charge to the first respondent for re-consideration. Having considered the second charge again, on 6.4.2017 the first respondent found that the applicant is guilty of the said second charge. This decision was again appealed to the second respondent which eventually was affirmed on 19.3.2018.
>
> Based on the above-mentioned facts, clearly the final decision that adversely affects the Applicant is the second respondent's decision on 19.3.2018 and not the first respondent's decision on 6.4.2017 as it was still under appeal at the material time.
>
> In the circumstances, the first respondent's decision is not subject to a judicial review.

(b) there is no statutory requirement for the second respondent to give its reasons or to give any directions pertaining to its decision to remit the second charge back to the first respondent for re-consideration;

(c) the reason to remit back the second charge to be re-considered by the first respondent had been given which is due to the existence of a discrepancy with regard to the punishment for the first charge imposed by the first respondent. In the record of proceedings, it states that the punishment imposed on the first charge is a 'warning'. However, in the first respondent's letter to the applicant dated 10 May 2016, it states the punishment is the reduction of three scales of salary for 36 months;

(d) the failure of the second respondent to state the effective date of punishment on the second charge is not fatal as reg 41(2) of the Public

Officers (Conduct and Discipline) Regulations 1993 provides that if no date is specified, the punishment shall be implemented 'on the date the punishment is imposed'. As such the punishment of the three scales of reduction of the applicant's salary for 36 months imposed by the first respondent was on 6 April 2017;

(e) the implementation and execution of the first respondent's decision in respect of the second charge, which was affirmed by the second respondent is the function of the Public Service Department and the related Ministry;

(f) there is no evidence to support the applicant's contention that the punishment of reduction of three salary scales for 36 months would result in the imposition of more than 36 months as imposed by the first respondent on the 6 April 2017 and affirmed by the second respondent on 19 March 2018. The learned judge added as follows:

> ... Clearly the authority has to make the necessary adjustment to comply with the said decision and any irregularity, if at all exist, does not affects the validity of the said decision.

(g) the second respondent had considered the detailed facts in relation to the second charge and the representation by the applicant and arrived at the finding that the applicant's conduct in appointing Southbank Office Fitout and Furniture without going through the Jawatankuasa Sebut Harga had clearly infringed the Treasury Instruction 170.3(a). In the instant case the Committee, Jawatankuasa Perumahan Perwakilan, MALAWAKIL Melbourne had earlier on 10 October 2011 appointed IRM Interiors PTY LTD to carry out the fit out and renovation works at the General Consulate Office, Melbourne;

(h) the issue of the composition of the first respondent in order to avoid biasness when the second charge was remitted back to the first respondent to be re-considered was neither pleaded nor raised in the applicant's affidavit in support. As such the same issue of composition of the first respondent to hear the second charge is untenable. The learned judge stated (in para 57 of the 'judgment') as follows:

> In any event, as alluded to earlier, the reason for the second charge been remitted back to the first respondent for consideration only relates to the discrepancy of the punishment with regard to the first charge which has been dismissed by the second respondent. Hence there is no bias in this regard on the part of the first respondent and also it does not prejudice the applicant.

(i) reg 37A clearly provides that an Investigation Committee can be formed if the Disciplinary Committee thinks it is necessary, which is not in the present case. Hence the issue of failure to form an Investigation Committee is also untenable.

[19] Based on the above reasons, the learned judge concluded that the second respondent's decision to remit the second charge to the first respondent and subsequently affirming the first respondent's decision in respect of the second charge is not tainted with any illegality, irrationality or procedural impropriety.

GROUNDS OF APPEAL

[20] The primary grounds raised by the applicant in the memorandum of appeal may be summarised as follows:

(a) the learned judge had erred in his decision that the first respondent's decision on 6 April 2017 is not subject to judicial review, as the application for judicial review commenced from the decision of the first respondent to the subsequent decision of the second respondent, including the punishment imposed;

(b) the learned judge had erred in his decision there is no duty on the second respondent to give reasons or specific directions to the first respondent when the second respondent decided to remit the second charge to the first respondent on 5 December 2016 for re-consideration. There was uncertainty as to whether the punishment imposed by the first respondent on 6 April 2017 in the first proceedings were set aside or were still in force;

(c) the learned judge had erred in the failure to establish an Investigation Committee and this constitutes a breach of the *audi alteram partem* rule.

(d) the learned judge had erred in fact and law in failing to consider the meaning of 'illegality', 'irrationality', and 'procedural impropriety' when there existed a clear discrepancy with regard to the punishment for the first charge imposed by the first respondent as stated in the letter informing the applicant of the first respondent's decision, and as stated in the second respondent's affidavit where the punishment was reduction of three scales of salary for 36 months for the first and second charge. However, in the affidavit of the first respondent, it states that the punishment imposed on the first charge is a 'warning', while the punishment on the second charge is the reduction of three scales of salary for 36 months;

(e) the learned judge had erred in his decision that the issue of the composition of the first respondent to re-consider the second charge was not subject to judicial review as the same had not been pleaded by the applicant;

(f) the learned judge had erred in his failure to make a decision on what was the effective date of punishment to be implemented on the applicant. In essence, the learned judge failed to consider there were two dates on

which the same punishment of reduction of three salary scales was imposed. The punishment imposed on 12 April 2016 and the same punishment imposed by the first respondent on re-consideration dated 6 April 2017. This renders the punishment defective;

(g) the learned judge had erred in his finding that the date of implementation of the punishment against the applicant in respect of the second charge was on the 6 April 2017 whereas the punishment was enforced against the applicant much earlier on the 12 April 2016. This resulted in the duration of the punishment to be extended beyond 36 months to 48 months. This is in contravention of arts 5(1) and 7(1) of the Federal Constitution; and

(h) the learned judge had erred in his finding that the applicant was in breach of Treasury Instruction 170.3(a) when the applicant appointed Southbank Office Fitout and Furniture instead of IRM Interiors PTY LTD for fit out and renovation works at the Consulate General Office in Melbourne, Australia. The learned judge had failed to consider that Southbank Office Fitout and Furniture and IRM Interiors PTY LTD is owned by the same individual at all material times and both companies had maintained the same quotation in respect of the proposed fit out and renovation works and that the two companies abovementioned differ in name only.

OUR DECISION

[21] After careful consideration of learned counsels' written and oral submissions as well as the appeal records, we were of the unanimous view that there were merits in this appeal that warrant appellate intervention. We therefore allowed this appeal with costs and set aside the order of the High Court. We give our reasons below.

[22] The grounds for judicial review have been clearly and succinctly enunciated by Lord Diplock in the landmark decision of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 and cited with approval by the Federal Court in the recent case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 at p 464; [2019] 4 CLJ 561 at p 28, stated as follows:

> Judicial review has I think developed to a stage today when one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.
>
> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must

give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can now succinctly be referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[23] Recent cases have also endorsed the abovementioned position that the current state of law on judicial review in Malaysia permits a review of both process and merit (see *Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA))* [2018] 2 MLJ 738; [2018] 6 CLJ 285; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

[24] While the appellant has listed numerous grounds of appeal in his 'Memorandum Rayuan', during the oral submissions before us, the focus of the arguments raised by learned counsels pertain to alleged procedural improprieties arising from the punishment imposed by the first respondent and affirmed by the second respondent on the second charge ie reduction of three salary scales for 36 months .It is to be noted that the arguments centred not on the punishment per se but primarily on two inter related issues: First, the legal implications of the uncertainty in respect of the status of the punishment when the second respondent remitted the second charge to the first respondent for re-consideration and second, the uncertainty in respect of the effective date of punishment on the second charge and consequences arising from the implementation thereof. Taking the cue from learned counsels, we therefore propose to address the above-mentioned issues only in our judgment. In our considered opinion, the determination of the issues abovementioned are sufficient to dispose of this appeal.

First issue

A Failure to set aside the punishment on the second charge

[25] The first issue raised by the applicant was that there was a procedural impropriety in the failure of the second respondent to provide clarity on the status of the punishment imposed by the first respondent in the earlier proceedings when the second respondent remitted the second charge back to the first respondent for re-consideration. In consequence thereof, the punishment imposed by the first respondent on 12 April 2016 in the first proceedings was still subsisting when the second charge was reconsidered by the first respondent, and the decision to affirm the same punishment in the subsequent proceedings was made by the first respondent on 6 April 2017. This was alleged to be highly prejudicial to the applicant.

[26] From the affidavit of YBhg Tan Sri Arpah bt Abdul Razak affirmed on behalf of the second respondent, the reason the second respondent had remitted the second charge back to the first respondent for re-consideration was due to a discrepancy in punishment on the two charges between what was stated in the first respondent's record of proceedings and what was conveyed by the first respondent to the applicant by letter dated 20 December 2016. The abovementioned discrepancy was also admitted by learned federal counsel in the hearing before us.

[27] In the affidavit of the first respondent, it states that the punishment imposed on the first charge is a 'warning', while the punishment on the second charge is the reduction of three scales of salary for 36 months. However, the first respondent had stated in the letter dated 20 December 2016 to the applicant, that the decision of the first respondent in respect of the first and second charges was punishment of reduction of three scales of salary for 36 months. The applicant was also informed that the second respondent will remit the second charge back to the first respondent for re-consideration. The relevant portion of the abovementioned letter is reproduced below:

> (i) mengakas keputusan dan hukuman Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 1) dan membebaskan YBhg Dato Dr bagi pertuduhan pertama; dan
>
> (iv) menghantar balik kes kepada Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 1) untuk ditimbang semula bagi Pertuduhan Kedua.

[28] However, there was no mention in the abovementioned letter that consequential to the second charge being remitted back to the first respondent for re-consideration, the punishment imposed on the second charge in the earlier proceedings before the first respondent would be set aside.

[29] While we do not question the decision of the second respondent to remit the second charge back to the first respondent for re-consideration, we are however of the considered view that the failure of the second respondent to set aside the punishment of reduction of three salary scales for 36 months on the second charge that was meted out by the first respondent in the earlier proceedings on 12 April 2016, was clearly a procedural impropriety that had resulted in grave prejudice to the applicant, as demonstrated below.

[30] First, the first decision by the first respondent to impose the punishment to reduce the applicant's salary by three scales for 36 months on the second charge was made on 12 April 2016. Since the second respondent had failed to set aside the punishment of the same when the second respondent remitted back the second charge to the first respondent for re-consideration, in effect, the said punishment remained in force. The applicant tendered documentary evidence to show that the punishment of reduction in salary by three salary scales was implemented consequential to the decision of the first respondent on 12 April 2016, and had not been set aside when the second respondent remitted back the second charge to be re-considered by the first respondent. This means that the punishment meted out in the earlier proceedings on 12 April 016 still subsists while the second charge was being 'reconsidered', by the first respondent, and the same punishment was decided by the first respondent on 6 April 2017. Thus, the impartiality and integrity of the first respondent's subsequent proceedings for reconsideration is clearly compromised as it raises the spectre of bias by the decision maker, as there is a real likelihood that he may be predisposed to affirm a sentence that had not been set aside.

[31] In addition, the implementation of the punishment consequential to the first respondent's decision on 12 April 2016 in the earlier proceedings has resulted in financial consequences to the applicant's livelihood as the applicant asserts that to date there has been no reimbursement of outstanding salary, bonus allowances and other benefits that should be due to the applicant. No evidence to the contrary has been tendered by the respondents.

[32] The implications of the failure of the second respondent to set aside the punishment above stated is serious indeed. Thus, in our view, this omission by the second respondent to set aside the punishment by the first respondent when the second charge was remitted back to the first respondent for reconsideration is a serious procedural impropriety that has tainted the proceedings of the first respondent and cannot lawfully be maintained by the second respondent in its decision to affirm the decision of the first respondent on 19 March 2018.

Second issue

Failure to state effective date of punishment

[33] The second procedural impropriety is the failure of the first respondent to state the effective date of punishment of reduction of three salary scales for 36 months. Certainty in the effective date of implementation and duration of punishment meted out is a legitimate procedural expectation of the applicant and a necessary trait of a fair decision-making process. It cannot be the case where a punishment is pronounced without an effective date as that would be akin to having the proverbial sword of Damocles hanging over the applicant's head, waiting for its fall whenever the relevant authorities deem fit.

[34] It is also worthy of note that the nature of the punishment imposed, which specifies a minimum period of 12 months and a maximum period of 36 months, makes it imperative that there be certainty in the effective date of punishment in order to comply with the express terms of the Regulation. The punishment imposed on the applicant on the second charge was pursuant to reg 41(1)(c) of the Public Officers (Conduct And Discipline) Regulations 1993 which is reproduced below:

> 41 Reduction of salary
>
> (1) The appropriate Disciplinary Authority may impose a punishment of reduction of salary on an officer in accordance with the following provisions:
>
> (a) ...
>
> (b) ...
>
> (c) *the duration of the punishment shall not be less than twelve months but shall not be more than thirty-six months on any one occasion.* (Emphasis added.)

[35] The undisputed facts in the instant case were that there were two proceedings by the first respondent on the second charge, albeit both proceedings had led to the same punishment. The first proceedings before the first respondent led to the decision to impose the punishment on the 12 April 2016. The second proceedings (on re-consideration) by the first respondent led to a decision of the same punishment on 6 April 2017. The first respondent's decision on 6 April 2017 was affirmed by the second respondent on the 19 March 2018. It stands to reason that there cannot be two different dates of the commencement of the same punishment on the same charge ie 12 April 2016 and 6 April 2017 against the same person, the applicant in the instant case. This underscores the earlier issue raised that the punishment meted out to the applicant in the earlier proceedings ought to have been set aside as a consequence of remitting the second charge back to the first respondent for re-consideration.

[36] In addition, the consequences are also highly prejudicial for the applicant as the punishment pertains to three scales of reduction in salary for 36 months. The contention of the applicant is that since the punishment of salary deduction was implemented from the decision on 12 April 2016 and had not been set aside when the second charge was remitted for re-consideration, and the same sentence was imposed on 6 April 2017, the effect is that the duration of the punishment would exceed the maximum 36 months stipulated by the reg 41(1). This is an irrefutable inference arising from the implementation of two punishments at two separate times. A punishment is only lawful if it is implemented in strict compliance with the express provisions of the law. Regulation 41(1) above expressly stipulates the minimum and maximum punishment of salary reduction that can be imposed. Any sentence which cannot be lawfully maintained is therefore invalid and renders the proceedings null and void.

[37] We note that the learned judge did not make a decisive finding on the legal implications arising from the uncertainty in respect of the effective date of punishment and there was a lack of judicial appreciation thereof. The learned judge had in fact conceded the possibility that the applicant's salary may have been deducted wrongfully, but agreed with the respondent that, if at all, it was an irregularity and not fatal to the decision. In this respect, we strongly disagree with the view expressed by the learned judge that it is an administrative matter in which financial 'necessary adjustment' may be made by the relevant authority. His Lordship had stated (at para 41) as follows:

> ... Clearly the authority has to make the necessary adjustment to comply with the said decision and any irregularity, if at all exist does not affects the validity of the said decision.

[38] The irrefutable inference to be drawn from the excessive salary deductions from the applicant, is either that the punishment had been implemented before its effective date or the punishment as implemented had exceeded the maximum duration stipulated by reg 41(1). Either way, the implementation of the punishment is both erroneous and unlawful. These wrongful salary deductions carry serious legal implications and can by no means be treated as an 'irregularity' that can be easily rectified by 'adjustment' of proper salaries due to the applicant by the relevant authorities.

[39] Learned federal counsel also contended that there is no necessity to state an effective date of punishment because the Public Officers (Conduct and Discipline) Regulations 1993 provides that in the event the Disciplinary Authority did not stipulate a date for the implementation of the punishment, the date of the implementation would be on the date the punishment is imposed. Reference was made to reg 41(2) which states as follows:

> 41(2) The punishment of reduction of salary imposed on an officer shall be implemented on the date as specified by the appropriate Disciplinary Authority or if no date is specified, on the date the punishment is imposed.

[40] A literal construction of reg 41(2) abovementioned where an effective date of punishment, if not stated may be construed as the date of decision would, in ordinary circumstances not give rise to any uncertainty as there would ordinarily be only one decision date. The facts of the instant case however, differ in that there were two dates of decision which imposed the same punishment. The first respondent's decision on 12 April 2016 and on re-consideration, the first respondent's decision on 6 April 2017. The respondents' contention is that the date of decision is 6 April 2017 and not 12 April 2016. However, the punishment of salary deduction had been implemented against the applicant consequential to the first respondent's decision on 12 April 2016. In these circumstances of two decisions on two different dates, a literal construction of reg 41(2) abovementioned is of little, if any assistance to determine the effective date of punishment.

[41] The same issue that the date of punishment can be construed from the date of decision as stated in the Regulation was raised before the Court of Appeal in the case of *Owi Cheng Ian v Suruhanjaya Pasukan Polis Diraja Malaysia & Ors* [2014] 6 MLJ 695; [2014] 8 CLJ 559. The necessity to state an effective date of punishment was endorsed by the Court of Appeal in the case of *Owi Cheng Ian*. The pertinent facts of the case were that the appellant, a chief inspector, had been dismissed from the police force. One of the issues raised by the appellant was the failure of the respondent to adhere to procedural requirements, inter alia, by their failure to state the date of the commencement of the decision in the 'Pemberitahuan Hukuman Tatatertib', the pertinent portion of which is reproduced below:

> Dengan hormatnya saya memaklumkan bahawa Suruhanjaya Pasukan Polis di dalam mesyuaratnya yang ke-74 pada 11.3.2009 selepas menimbang surat representasi tuan bertarikh 20.1.2008 dengan teliti dan saksama telah membuat keputusan seperti berikut:
>
> (a) Tuan didapati bersalah dan dikenakan hukuman Buang Kerja Mengikut Peraturan 38 (o) Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 bagi pertuduhan pertama.

[42] It is worthy of note that the appellant in *Owi Cheng Ian* charged under the same Regulations as in the instant case, ie Public Officers (Conduct and Discipline) Regulations 1993. The same issue on the absence of a date of effective punishment was raised which the learned High Court judge had construed as the date of decision, as stated in the Regulations. Nevertheless, Abdul Wahab Patail JCA(as he then was), who delivered the decision held that the relevant Disciplinary Authority must state clearly the date of

commencement of punishment as, inter alia, it has financial implications, (as in the instant case). His Lordship had stated as follows:

> [21] The appellant was served with a copy of the letter nearly two months later on 6 May 2009. Although this third issue was specifically raised by the appellant at para 10(f) of his affidavit dated 30 May 2009, it was not addressed in the affidavit in reply. The High Court held that the date of termination operates from the date of the decision. With respect, the High Court erred in stopping at that determination. The point is that the determination was made upon litigation. No further litigation should become necessary to determine the details of an order of a disciplinary authority. *The point raised is that the Pemberitahuan Hukuman Tatatertib ought to have stated it clearly, reflecting the decision of the disciplinary authority precisely as to when it intended the punishment of dismissal to operate from. It is also important as it impacts upon the payments, if any, the appellant was entitled to receive or even to refund. Such date cannot be assigned by other than the disciplinary authority. Without the date of dismissal being specified, the dismissal was incomplete and, therefore, defective.* (Emphasis added.)

[43] The principle in *Owi Cheng Ian* also applies to the facts of the instant case before us where there is uncertainty in the effective date of punishment on the second charge as a result of two separate decision dates of the first respondent. The consequence to the applicant is that the implementation of the punishment of the applicant's salary deduction by three salary scales from 12 April 2016 was therefore unlawful. This cannot be dismissed as a mere irregularity which can be easily rectified by making necessary salary adjustments to comply with the Regulation.

[44] We note that the respondents did not dispute the above contention of the applicant that the implementation of the reduction of three salary scales was effected as a result of the first respondent's decision on 12 April 2016 instead of the subsequent decision on 6 April 2017. In response, learned federal counsel had forwarded the argument that the implementation and execution of the first respondent's decision in respect of the second charge, which was affirmed by the second respondent is the function of the Public Service Department and the related Ministry, and was thus removed from the exercise of the powers of the first and second respondents. It was contended further that on this premise, the implementation and execution of the said punishment against the applicant is not within the purview of the first and second respondents.

[45] Learned federal counsel had stated the following in her written submissions dated 21 January 2020 at paras 44–47 reproduced as follows:

> It is respectfully submitted that the finding of guilt and punishment with respect to the second charge is not rendered defective by the irregularity (if any) in the

implementation of the punishment imposed by the Disciplinary Board which was affirmed by the Disciplinary Appeal Board.

As submitted earlier, the implementation of the punishment is a distinct and separate administrative exercise which does not fall within the purview of the Disciplinary Board and the Disciplinary Appeal Board pursuant to the Public Officers (Conduct and Discipline) Regulations 1993 [PU(A) 395/1993].

The Disciplinary Board and the Disciplinary Appeal Board is rendered functus officio once a decision is delivered.

In this instance the learned Judge was correct in holding at [40] and [41] of page 24 RRT that it is the function of the Public Service Department and the related Ministry to implement and execute the decision and in the event there is any irregularity it does not affect the validity of the decision arrived at by the Disciplinary Board and the Disciplinary Appeal Board.

[46] The argument of learned federal counsel above stated appears to distance the implementation of the punishment from the decisions of the Disciplinary Board and Disciplinary Appeal Board which had meted the punishment. However, this ingenious argument fails to take into consideration that the resulting effect of an erroneous and wrongful implementation of the punishment in question was directly attributable to the failure of the second respondent to set aside the punishment of the reduction of three salary scales on the second charge in the earlier proceedings of the first respondent when the second respondent made the decision to remit the second charge for reconsideration by the first respondent. It is all too easy and too convenient for learned federal counsel to take the position to distance the implementation of the punishment of reduction of three salary scales for 36 months from the purview of the first and second respondents by treating it as a purely administrative matter.

[47] We note that in *Owi Cheng Ian*, the Court of Appeal had stated in clear and succinct terms that it was the duty of the Disciplinary Authority to state when it intended the punishment of dismissal to operate and that 'Such date cannot be assigned by other than the disciplinary authority'.

[48] For all the reasons stated above, we are of the considered view that there are serious procedural improprieties in the decision-making process of the first and second respondents that warrant appellate intervention. To summarise: there was admitted discrepancy by the first respondent in the punishment on the second charge as recorded in the first respondent's notes of proceedings and the punishment informed to the applicant by letter. When the second respondent discovered the discrepancy and remitted back the second charge to be re-considered by the first respondent, the second respondent had failed to set aside the punishment on the second charge in the earlier proceedings before the first respondent. As a consequence, the punishment of reduction of three

salary scales subsisted and was implemented against the applicant since 12 April 2016. The first respondent subsequently imposed the same punishment by its decision dated 6 April 2017. This was affirmed by the second respondent on 19 March 2018. Thus, there were two commencement dates of punishment imposed in respect of the same punishment and the same charge. No evidence was tendered by the respondents that the deductions of salary that was wrongfully made against the applicant has been refunded. In effect and in practical terms the applicant was subjected to two punishments for the same charge.

[49] It would be a gross injustice to treat these serious procedural improprieties as mere irregularities that can be rectified by suitable financial adjustment, or to attempt to absolve the respondents of its public duty to act fairly by the argument that the implementation of the punishment is the function of the Public Service Department and the related Ministry, and removed from the exercise of the powers of the first and second respondents, and thus was not within the purview of the respondents.

[50] We would like to emphasise here that in exercising public functions against the individual, public bodies have a duty to act fairly in substance as well as procedure and courts have to be vigilant to ensure that might does not become right. More than 40 years ago, the late Raja Azlan Shah CJ (Malaya) (as HRH then was) had made the following observations in the celebrated case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, which observations still ring true today. His Lordship stated:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression.
>
> In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen, so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place (per Danckwerts LJ in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 443).

[51] For all the reasons stated above, we were unanimous in our view that there were serious procedural improprieties by the second respondent in the failure to set aside the punishment on the second charge on remitting the second charge for reconsideration by the first respondent and the failure of the

respondents to specify an effective date of said punishment which had led to wrongful deductions to the applicant's salary. We are of the considered view that these are serious procedural improprieties that have tainted the fairness and justice of the proceedings.

[52] We therefore allowed the appeal and the prayers of the applicant as stated in para 2(a), (b), (c) and (d) of the applicant's judicial review application under O 53 of the Rules of Court 2012. In particular we allowed the following reliefs:

(a) an order of certiorari to quash the decision of the Disciplinary Board for the Managerial Group (No 1) ('Disciplinary Board') dated 06 April 2017, which found the applicant guilty of a disciplinary misconduct and imposed the punishment of a salary reduction of three salary scales for a period of 36 months; and/or

(b) an order of certiorari to quash the decision of the Disciplinary Appeal Board, Public Service Commission ('Disciplinary Appeal Board') dated 19 March 2018 which affirmed the decision of the Disciplinary Board on 06 April 2017.

[53] We also awarded costs of RM20,000 to the applicant/appellant subject to allocatur.

Appeal allowed with costs of RM20,000.

Reported by Kohila Nesan